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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
7

8 GARY CRAIG ROSALES,
9 *Petitioner,*

3:16-cv-00003-RCJ-WGC

10 vs.

ORDER

11 Q. BYRNE, *et al.*,

12 *Respondents.*

14 This represented habeas matter under 28 U.S.C. § 2254 comes before the Court
15 on petitioner's motion for a stay (ECF No. 38) and his motion for leave to file a
16 supplemental exhibit in support of the motion for a stay (ECF No. 45).

17 ***Background***

18 Petitioner Gary Rosales challenges his Nevada state conviction, pursuant to a jury
19 verdict, of seven counts of discharging a firearm at or into an occupied structure, one
20 count of aggravated stalking, and one count of attempted murder with the use of a deadly
21 weapon.

22 On respondents' earlier motion to dismiss, the Court held that Grounds 1 through
23 4 were unexhausted.

24 In Ground 1, petitioner alleges that the judge presiding at his trial and sentencing
25 had an intolerable probability of actual bias in violation of his rights to a fair trial and due
26 process in violation of the Sixth and Fourteenth Amendments because the judge had
27 been endorsed in a recent election by the district attorney, who was the victim on the
28 aggravated stalking charge. (ECF No. 15, at 18-21. See also ECF No. 16-19, at 5-6.)

In Ground 2, Rosales alleges that he was denied effective assistance of counsel when trial counsel failed to move to recuse the trial judge based on the bias claim alleged in Ground 1 and when appellate counsel failed to raise the bias issue on appeal. (ECF No. 15, at 21-23.)

In Ground 3, petitioner alleges that he was denied effective assistance of counsel when: (a) defense counsel failed to file a petition for a writ of mandamus in the state supreme court after the trial court denied a motion to disqualify the special prosecutor on the basis that: (i) the special prosecutor had been employed with the district attorney's office during the time of the aggravated stalking of the district attorney and had retired from that office only months before taking over the prosecution; and (ii) he worked out of and used the resources of the district attorney's office when prosecuting the case; and (b) appellate counsel thereafter (i) failed to pursue the foregoing disqualification issue on direct appeal; and (ii) failed to oppose the district attorney's motion for reconsideration after appellate counsel initially successfully secured an order disqualifying the district attorney from appearing on the direct appeal. (ECF No. 15, at 23-30.)

16 In Ground 4, petitioner alleges that he was denied effective assistance of counsel
17 when trial counsel failed to file a motion for change of venue based upon pretrial publicity.
18 (ECF No. 15, at 31-34.)

Rosales now moves to stay the federal action so that he can exhaust the claims in state court. He has filed a state court petition seeking to exhaust the claims. A motion to dismiss by the State has been briefed and is pending for decision before the state district court in No. CR05-0914 in that court.¹

Governing Law

To obtain a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), a petitioner must demonstrate that he had good cause for his failure to exhaust the unexhausted claims previously, that at least one claim potentially is meritorious, and that he has not engaged

¹ In addition to the papers on file, the Court takes judicial notice of the online docket records of the state district court. *E.g., Harris v. County of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012).

1 in intentionally dilatory litigation tactics. 544 U.S. at 278; *Dixon v. Baker*, 847 F.3d 714,
2 722 (9th Cir. 2017).

3 On the first requirement, the case law has not delineated the precise contours of
4 what constitutes “good cause” in any great detail to date. *Dixon*, 847 F.3d at 720. A
5 substantial amount of flexibility likely always will inhere in the requirement, given that
6 “[t]he good cause element is the equitable component of the *Rhines* test.” *Blake v. Baker*,
7 745 F.3d 977, 982 (9th Cir. 2014).

8 In *Blake*, the Ninth Circuit held that a showing of good cause under *Rhines* for a
9 failure to exhaust a claim of ineffective assistance of trial counsel, based on alleged
10 ineffective assistance of postconviction counsel, cannot be more demanding than a
11 showing of cause to overcome a procedural default of the ineffective-assistance claim
12 under *Martinez v. Ryan*, 566 U.S. 1 (2012). *Blake*, 745 F.3d at 982-84. In this regard, a
13 petitioner must present more than “a bare allegation of state postconviction” ineffective
14 assistance and instead must present “a concrete and reasonable excuse, supported by
15 evidence that his state postconviction counsel” was ineffective. See 745 F.3d at 983. A
16 petitioner with an unexhausted claim of ineffective assistance of trial counsel “has a path
17 to a stay under *Rhines* if he alleges a plausible claim that his post-conviction counsel was
18 ineffective.” *Dixon*, 847 F.3d at 722.²

19 On the second *Rhines* requirement, a claim is plainly meritless in this context only
20 when it is perfectly clear that the petitioner does not raise even a colorable federal claim
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22 ² The practical import of the Ninth Circuit’s holding in *Blake* was limited by the holding by the
23 Supreme Court of Nevada five months later in *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014). In
24 *Brown*, the state high court held that the rule in *Martinez* does not provide a basis for overcoming state
25 procedural bars under Nevada law. Accordingly, when the federal district court is presented with an effort
26 to overcome a potential procedural default of – only – a claim of ineffective assistance of trial counsel based
27 – solely – on the rule in *Martinez*, there would appear to be no point in granting a stay for a petitioner to
28 return to Nevada state court. Such an exercise would be pointless because, under *Brown*, the Nevada
state courts will not recognize *Martinez* as a basis for overcoming state procedural bars. In such a
circumstance, the Court has found the claim technically exhausted by procedural default and often will defer
a determination of whether the petitioner can overcome the procedural default under *Martinez* until after
the filing of an answer and reply addressing the issue on a full record and argument. See, e.g., *Rodriguez*
v. Filson, 2017 WL 6782466, at *4-*6, No. 3:15-cv-00339-MMD-WGC, ECF No. 33, at 7-11 (D. Nev., Dec.
29, 2017); *Myers v. Filson*, 2017 WL 5559954, at *2-*4, No. 3:14-cv-00082-MMD-VPC, ECF No. 57, at
4-8 (D. Nev., Nov. 17, 2017).

1 and thus has no hope of prevailing. See *Rhines*, 544 U.S. at 277; *Dixon*, 847 F.3d at 722;
2 *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). Respondents concede that all
3 four unexhausted grounds clear this low threshold. (ECF No. 41, at 3.)

4 On the third requirement, respondents also concede that petitioner has not
5 engaged in intentionally dilatory litigation tactics. (*Id.*) While it perhaps is not
6 inconceivable that a noncapital habeas petitioner might engage in intentionally dilatory
7 tactics, the relevance of this factor, as a practical matter, largely is restricted to capital
8 cases.³

9 **Discussion**

10 The Court, ultimately, is persuaded that petitioner has demonstrated good cause
11 in this particular case given the interrelationship between Grounds 1 and 2.

12 Rosales presents three arguments seeking to establish good cause regarding
13 Ground 1. First, he urges that he can demonstrate cause for the failure to exhaust the
14 ground earlier under the rule in *Martinez* due to alleged ineffective assistance of
15 postconviction counsel. Second, he contends that he has good cause for the failure to
16 exhaust Ground 1 (as well as Ground 2) because the trial court and district attorney
17 allegedly withheld information and failed to disclose to the defense that the district
18 attorney had endorsed the presiding judge in the recent election. Third, as discussed
19 further below, he seeks to establish good cause based upon the interrelationship between
20 the substantive claim in Ground 1 and an ineffective-assistance claim in Ground 2.

21 On the first argument, Rosales suggests that the Court “expressed skepticism” in
22 its prior order as to whether *Martinez* applied to Ground 1. (ECF No. 38, at 8.) The Court
23 was not merely skeptical; it affirmatively held that “*Martinez* does not apply to such a
24 claim.” (ECF No. 37, at 7.) That is the law. As the Supreme Court has stated, “[a]pplying

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26 ³ Cf. *Lawrence v. Florida*, 549 U.S. 327, 344 & n.9 (2007) (Ginsburg, J., dissenting) (“Most prisoners
27 want to be released from custody as soon as possible, not to prolong their incarceration. They are therefore
28 interested in the expeditious resolution of their claims. Though capital petitioners may be aided by delay,
they are a small minority of all petitioners.”); *Valdovinos v. McGrath*, 598 F.3d 568, 574 (9th Cir. 2010),
vacated for reconsideration on other grounds, 562 U.S. 1196 (2011) (petitioner “had not engaged in dilatory
tactics and he had no motivation for delay, as he is not a capital defendant”).

1 Martinez’s highly circumscribed, equitable exception to new categories of procedurally
2 defaulted claims would . . . do precisely what this Court disclaimed in Martinez: Replace
3 the rule of *Coleman* [v. *Thompson*, 501 U.S. 722 (1991)] with the exception of Martinez.”
4 *Davila v. Davis*, 137 S.Ct. 2058, 2066 (2017). Martinez cannot directly provide a basis
5 for cause to overcome any procedural default of Ground 1, or by extension under *Blake*,
6 for good cause under *Rhines* for a failure to exhaust Ground 1.⁴

7 On the second argument, respondents do not contend that the inherent public
8 nature of the endorsement, standing alone, precludes a finding that the trial judge and
9 district attorney withheld and failed to disclose information regarding the endorsement
10 specifically to the defense. Respondents instead seek to defeat the second argument
11 based upon when Rosales actually learned about the endorsement on the internet.
12 However, respondents posit that Rosales learned of the endorsement only “sometime
13 after he was released on bail in July 2009 [eight months before the February 2010 trial]
14 and before sentencing [in March 2010].” (ECF No 41, at 4.) To the extent that Rosales’
15 actual factual knowledge of the endorsement is a material point, the current record does
16 not necessarily establish that he learned of the endorsement at a time when he
17 seasonably could have sought disqualification at the very least prior to the trial.

18 In all events, given its disposition on petitioner’s third argument discussed below,
19 the Court will pretermit further consideration of whether Rosales can establish good cause
20 for failure to exhaust Ground 1, in whole or in part, based upon his second argument.
21 The Court makes no holding in that regard. Moreover, the Court makes no implied holding
22 as to whether Rosales can or cannot overcome state procedural bars based upon his
23 argument that the trial court and district attorney withheld information regarding the

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25 ⁴ Moreover, as alluded to in note 2, *supra*, it would be pointless to stay the federal case for Rosales
26 to pursue a Martinez argument as to Ground 1 in Nevada state court because the state courts do not
27 recognize Martinez as a basis for overcoming state procedural bars even as to claims of ineffective
28 assistance of trial counsel. The state supreme court’s holding to that latter effect in *Brown* substantially
 limits the viability of a Martinez-based argument as a direct basis for a stay under the Ninth Circuit’s earlier
 holding in *Blake*. If a petitioner’s only claimed basis for overcoming a procedural default of a claim is
 Martinez, then the next logical step is adjudication of the Martinez issue in federal court, not entry of a stay
 to pursue a Martinez argument that plainly is foreclosed by governing state supreme court authority.

1 endorsement. That is an inquiry for the Nevada state courts in the currently pending state
2 proceedings.

3 Petitioner's third good-cause argument is premised upon the interrelationship
4 between the substantive claim in Ground 1 and the claim of ineffective assistance of trial
5 counsel in Ground 2. Alleged ineffective assistance of trial counsel in failing to seek to
6 disqualify the trial and sentencing judge can be relied upon as cause in an effort to
7 overcome the procedural default of the underlying substantive claim. *E.g., Murray v.*
8 *Carrier*, 477 U.S. 479, 488-89 (1986). For the ineffective-assistance claim to potentially
9 serve as cause, however, that claim itself must be both exhausted and not procedurally
10 defaulted. See, e.g., *id.*; *Cockett v. Ray*, 333 F.3d 938, 943 (9th Cir. 2003).

11 In the present case, if the Court *arguendo* otherwise was inclined to deny a stay
12 based on his other arguments, Rosales could be required to dismiss the unexhausted
13 claims that are not subject to *Martinez*, such as Ground 1, or face a full dismissal. If the
14 claims were dismissed, the Court then would proceed on to a determination of, *inter alia*,
15 whether Rosales can overcome a procedural default of the trial ineffective-assistance
16 claim in Ground 2 under *Martinez*. If the Court ultimately concluded that Rosales could
17 overcome a procedural default of that claim under *Martinez*, the claim then would be
18 potentially available to establish cause and prejudice to overcome any procedural default
19 of Ground 1. However, under the scenario just outlined, Ground 1 no longer would be
20 before the Court. In this situation, subject to the points noted below, the more prudent,
21 pragmatic and equitable course would appear to be to grant a stay. With a stay, Ground
22 1 will not be dismissed in what ultimately may prove to be a premature dismissal from the
23 case before the Court makes a determination under *Martinez* as to Ground 2.

24 The Court notes in this regard that – at least on the arguments presented on the
25 motion to stay – Rosales presents an at least debatable basis for overcoming state
26 procedural bars as to Ground 1 premised upon the trial court and district attorney
27 allegedly withholding information regarding the endorsement from the defense. This
28 Court has not held that Rosales can, or cannot, demonstrate good cause under *Rhines*

1 for the failure to exhaust on this basis. However, the present briefing does not necessarily
2 establish that Rosales' argument has no chance of succeeding as a matter of law under
3 Nevada state law pertaining to the state procedural bars.

4 The Court further notes that – but for the fact that the Nevada state courts do not
5 recognize *Martinez* as a basis for overcoming state procedural bars – a stay otherwise
6 would be warranted under *Blake* as to the Ground 2 trial ineffective-assistance claim
7 standing alone. That is, Rosales has presented an at least plausible claim supported by
8 evidence that his state postconviction counsel was ineffective in failing to raise the claim.

9 The Supreme Court's decision nine months prior to Rosales' trial in *Caperton v.*
10 *A.T. Massey Coal Co.*, 556 U.S. 868 (2009), provided a potential legal foundation for both
11 Grounds 1 and 2. *Caperton* departed from prior Supreme Court caselaw that would find
12 a due process violation based upon alleged judicial bias only when the judge had a direct,
13 personal, substantial and/or pecuniary interest in the outcome. Chief Justice Roberts'
14 dissent in *Caperton* criticized the majority opinion as stating a new bias rule that "fail[ed]
15 to provide clear, workable guidance for future cases." 556 U.S. at 893. He listed forty
16 questions raised by the decision that he stated represented "only a few uncertainties that
17 quickly come to mind." 556 U.S. at 893-98. The questions included the following:

18 20. Does a debt of gratitude for endorsements by
19 newspapers, interest groups, politicians, or celebrities also
20 give rise to a constitutionally unacceptable probability of bias?
21 How would we measure whether such support is
22 disproportionate?

23 556 U.S. at 895.

24 Given the questions as to the potential reach of *Caperton* posed by Chief Justice
25 Roberts' dissent, neither Ground 1 nor the trial ineffective-assistance claim in Ground 2
26 necessarily were subject to dismissal on their face on the facts presented in Rosales'
27 case. Prior Nevada state caselaw had held that an endorsement of a judge did not
28 provide a basis for recusal. See, e.g., *State, Department of Transportation v. Betsy*, 113
29 Nev. 709, 941 P.2d 969 (1997), overruled on other grounds, *GES, Inc. v. Corbitt*, 117
30 Nev. 265, 268 n.6, 23 P.3d 11, 13 n.6 (2001). However, that caselaw had been premised

1 at least in part upon the due process rule stated in the prior Supreme Court precedent
2 from which *Caperton* departed. See 113 Nev. at 711, 941 P.2d at 970.⁵

3 Rosales accordingly presents a sufficiently plausible claim of ineffective assistance
4 of postconviction counsel for failure to raise the claim in Ground 2 that a stay would have
5 been warranted under *Blake* if the state courts recognized *Martinez* as a basis for
6 overcoming state procedural bars.⁶ Given the scenario described previously and the
7 divergence between federal and Nevada state law with respect to *Martinez*, the order that
8 most accords with the principles of comity and federalism that underlie the exhaustion
9 and procedural default doctrines is a stay of this matter until the interrelated substantive
10 claim in Ground 1 is exhausted in the ongoing state court proceedings. The Court finds
11 that Rosales therefore has demonstrated good cause on the record presented.

12 In staying this matter, the Court makes no broad holding applicable to other cases,
13 as the good-cause requirement is a flexible equitable standard turning upon the specific
14 facts of each case. See, e.g., *Blake*, *supra*. The Court further makes no implied holding
15 as to whether Rosales can overcome a procedural default of the claim in Ground 2 under
16 *Martinez* and/or as to the merits of that ground. The Court makes only a preliminary
17 procedural determination that a stay is warranted.⁷ Nor does the Court make any

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19 ⁵ On the current record and argument, the Court is not persuaded by respondents' suggestion that
20 trial counsel necessarily would have been aware or reasonably should have been aware of the potential
21 basis for disqualification only once he was informed of the endorsement by Rosales himself. (See ECF No.
22 41, at 4.) On a preliminary procedural question as to whether to stay the action, the Court is not going to
23 definitively resolve potentially competing factual inferences on the underlying ineffective-assistance claim
24 to determine whether petitioner presents a plausible claim of ineffective assistance of post-conviction
25 counsel in failing to raise the ineffective-assistance claim.

26 ⁶ The Court is not persuaded, on the current record and argument, by respondents' suggestion that
27 the fact that state post-conviction counsel raised other claims *ipso facto* leads to a conclusion that she was
28 not ineffective in raising the trial ineffective-assistance claim in Ground 2. (See ECF No. 41, at 5-6.) Nor
is the Court persuaded by respondents' suggestion that it is in some sense material that Rosales was not
"prohibited" from raising the claim in Ground 2 in either his *pro se* original state petition or the counseled
supplement. (See *id.*, at 6-7.) Particularly given *Martinez*, that argument simply begs the question.

29 ⁷ In this vein, the Court declines petitioner's request for an evidentiary hearing at this juncture. The
30 preliminary showing required under *Rhines* "should . . . not be any *more* demanding than the standard for
31 excusing a procedural default." *Dixon*, 847 F.3d at 722 (emphasis added). The showing thus need not
32 necessarily be as demanding initially as any full evidentiary showing that ultimately might be required to
33 overcome a procedural default. It would be the rare case indeed where a federal court would have occasion
34 to hold an evidentiary hearing to resolve the preliminary procedural question of whether to enter a stay.

1 determination with regard to Grounds 3 and 4. The Court's inquiry need extend only to
2 whether a stay should be entered. It otherwise does not conduct further claim-by-claim
3 assessment as to whether the *Rhines* criteria are satisfied also as to other claims once it
4 determines that a stay is warranted as to at least one ground.⁸

5 The motion for a stay therefore will be granted.

6 IT THEREFORE IS ORDERED that petitioner's motion for a stay (ECF No. 38) is
7 GRANTED and that this action is STAYED pending the completion of the currently
8 pending state court proceedings, conditioned upon petitioner filing a motion to reopen
9 within forty-five (45) days of issuance of the remittitur at the conclusion of all state court
10 proceedings.⁹ Any party otherwise may move to reopen the matter at any time and seek
11 any relief appropriate under the circumstances.

12 IT FURTHER IS ORDERED that, with any motion to reopen filed following the
13 completion of all state court proceedings pursued, petitioner: (a) shall attach an indexed
14 chronological set of exhibits containing the state court record materials relevant to the
15 issues herein that cover the period between the state court record exhibits on file in this
16 matter and the motion; and (b) if petitioner then intends to further amend the petition, shall
17 file a motion for leave to amend along with the proposed verified amended petition or a
18 motion for extension of time to move for leave. Respondents shall have thirty (30) days
19 to file a response to the motion(s) filed. The reopened matter will proceed under the
20 current docket number. No claims have been dismissed in conjunction with the stay.

21 IT FURTHER IS ORDERED that petitioner's unopposed motion for leave to file a
22 supplemental exhibit in support of the motion for a stay (ECF No. 45) is GRANTED.

23 No further hard copies of exhibits electronically filed in the record need be nor shall
24 be submitted in this action.

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26 ⁸ *Accord Wright v. LeGrand*, 2014 WL 3428487, at *13, No. 3:12-cv-00286-MMD-VPC, ECF No.
27 55, at 23 (D. Nev., July 10, 2014); *Nika v. McDaniel*, 2010 WL 3463584, at *2-*3, No. 3:09-cv-00178-JCM-
WGC, ECF No. 47, at 4 (D. Nev., Aug. 27, 2010).

28 ⁹ If *certiorari* review will be sought or thereafter is being sought, either party may move to reinstate
the stay for the duration of any such proceedings. Cf. *Lawrence v. Florida*, 549 U.S. 327, 335 (2007).

The Clerk of Court accordingly shall ADMINISTRATIVELY CLOSE this action until the Court grants a motion to reopen the matter.

DATED: This 11th day of March, 2019.

ROBERT C. JONES
United States District Judge